

Surrogate Parents

A Guide to the Surrogate Parent Process



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Technical Assistance guides are developed by the Division of Special Education to provide guidance to schools, parents and advocates regarding eligibility for and the implementation of services to students with disabilities under the Individuals with Disabilities Education Act, the Administrative Rules of Montana, and Montana statutes.

This document contains recommended practices and procedures that may enhance the services to children and youth with disabilities. All policy statements regarding the delivery of special education and related services are contained in the current *Montana State Plan Under the Individuals with Disabilities Education Act*.

If you have questions regarding the *Surrogate Parents* process after reviewing this guide, please contact the Legal Division at 444-4402.

Comments, additional questions or suggestions regarding this guide may be sent to:

Surrogate Parents Guide Changes
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SURROGATE PARENTS

The Individuals with Disabilities Education Act 1997 (IDEA) requires that, in certain circumstances, a surrogate parent be appointed for a child with an IDEA disability to protect the child's rights to a free appropriate public education. When a school district or institution determines that a child is in need of a surrogate parent, Montana law requires that the school district or institution that provides education to the child nominate a surrogate parent for appointment by the Montana Youth Court. This guide provides guidelines for the nomination and appointment of a surrogate parent.

1. When must a surrogate parent be nominated?

There are three situations that require a school to have a surrogate parent appointed to ensure the rights of a child with a disability are protected. These are—

- No parent can be identified;
- After taking reasonable efforts to locate the parent the school is unable to find the parent; and
- The child is a ward of the state and the rights of the child's parents have been permanently terminated by a court of competent jurisdiction.

20-7-461 MCA Appointment and termination of appointment of surrogate parent

2. What are the responsibilities of a surrogate parent?

The surrogate parent may represent the child in all matters relating to—

- The identification, evaluation, and educational placement of the child; and
- The provision of a free appropriate public education to the child.

34 CFR 300.515(e) Surrogate Parents

20-7-401(5) MCA Definitions

3. Who is considered to be a “parent”?

Under IDEA the term “parent” means:

- a natural or adoptive parent of a child;
- a guardian, but not an employee of the state if the child is a ward of the state;
- a person acting in the place of a parent such as a grandparent or stepparent with whom the child lives;
- a person who is legally responsible for the child's welfare; or
- a surrogate parent who has been appointed in accordance with 34 CFR 300.515 and 20-7-461 MCA.

A foster parent may act as a parent if the natural parents' authority to make educational decisions on the child's behalf has been extinguished under state law; and the foster parent:

- has an ongoing, long-term parental relationship with the child;
- is willing to make the educational decisions required of parents; and
- has no interest that would conflict with the interests of the child.

34 CFR 300.20 Parent

4. Is a guardian ad litem considered a parent?

No. However, a school district or institution could nominate the guardian ad litem to be appointed as a surrogate parent for the child.

5. Does a surrogate parent need to be appointed for a child in the custody of the Department of Public Health and Human Services?

It depends. A surrogate parent needs to be appointed only if all rights of the parents have been permanently terminated. If the child's parents' rights have not been permanently terminated, no surrogate parent is permitted to be appointed unless the parents cannot be located or identified.

6. How does a school district nominate a surrogate parent to be appointed by the Montana Youth Court?

The District must have a method for—

- Determining whether a child needs a surrogate parent; and
- Nominating a surrogate parent to be appointed by the Youth Court.

20-7-461 MCA Appointment and termination of appointment of surrogate parent

7. Who may the district nominate to be a surrogate parent?

The district shall ensure that a person selected as a surrogate parent is an adult who—

- Is not an employee of the Office of Public Instruction, the district or any other agency that is involved in the education or care of the child;
- Has no interest that conflicts with the interest of the child he or she represents; and
- Has the knowledge and skills that ensure adequate representation of the child.

Whenever practicable, the surrogate parent must be familiar with the cultural or language background of the child. The district may nominate as a surrogate parent a person who is an employee of a *nonpublic agency* that only provides noneducational care for the child and who meets the above standards. A person is not an employee of the agency/district (agreement with terms above) solely because he or she is paid by the agency/district to serve as a surrogate parent.

20-7-461 MCA Appointment and termination of appointment of surrogate parent

8. **Can someone from an agency responsible for the child (i.e., Department of Family Services, group home, etc.) act as the parent or be nominated as the surrogate parent?**

No.

9. **Can the child's social worker act as the parent or be nominated as the surrogate parent?**

No.

10. **If parental rights have been temporarily removed, can a surrogate parent be appointed?**

No, unless the parent cannot be located or identified, or the parental rights regarding education have been removed.

11. **If the court action granting temporary custody to the state stipulates that parent rights regarding education have been removed, must the district nominate a surrogate?**

Yes.

LAWS AND RULES REGARDING SURROGATE PARENTS

Montana Statutes Regarding Surrogate Parents:

20-7-401 Definitions (reads in part)

(17) "Surrogate parent" means an individual appointed to safeguard a child's rights and protect the child's interests in educational evaluation, placement, and hearing or appeal procedures concerning the child.

(History: En. 75-7801 by Sec. 419, Ch. 5, L. 1971; amd. Sec. 1, Ch. 93, L. 1974; amd. Sec. 27, Ch. 266, L. 1977; amd. Sec. 1, Ch. 539, L. 1977; R.C.M. 1947, 75-7801; amd. Sec. 1, Ch. 311, L. 1981; amd. Sec. 1, Ch. 461, L. 1983; amd. Sec. 1, Ch. 560, L. 1985; amd. Sec. 1, Ch. 618, L. 1985; amd. Sec. 6, Ch. 413, L. 1989; amd. Sec. 19, Ch. 16, L. 1991; amd. Sec. 3, Ch. 249, L. 1991; amd. Sec. 1, Ch. 356, L. 1993; amd. Sec. 19, Ch. 472, L. 1997; amd. Sec. 99(4), Ch. 51, L. 1999.)

20-7-461 Appointment and termination of appointment of surrogate parent.

(1) A school district or institution that provides education to a child with a disability shall adopt procedures to assign an individual to act as a surrogate parent for a child with a disability whenever the parents or guardian cannot be identified or, after reasonable efforts, the location of the parents cannot be discovered or if the child is a ward of the state. The determination of need for a surrogate parent must be made within 10 days of the date on which the school district or its designee or the governing authority of an institution or its designee learns of the presence of the child in the district. If the child is in need of a surrogate parent, the trustees of a school district or their designee or the governing authority of an institution or its designee shall nominate a surrogate for the child within 30 days of that determination.

(2) The person nominated as a surrogate parent must be an adult who is not an employee of a state or local educational agency that is providing educational services to the child. The surrogate parent may not have a vested interest that will conflict with the person's representation and protection of the child. The surrogate, whenever practicable, must be knowledgeable about the educational system, special education requirements, and the legal rights of the child in relation to the educational system. Whenever practicable, the surrogate parent must be familiar with the cultural or language background of the child.

(3) The nomination for appointment of a surrogate parent, along with all necessary supporting documents, must be submitted to the youth court for official appointment of the surrogate parent by the court. The trustees of a school district or their designee or the governing authority of an institution or its designee shall take all reasonable action to ensure that the youth court appoints or denies the appointment of a person nominated as a surrogate parent within 45 days of the court's receipt of all necessary supporting documents. If the youth court denies an appointment, the trustees of a district or their designee or the governing authority of an institution or its designee shall nominate another person to be appointed as the surrogate parent.

(4) The superintendent of public instruction shall adopt rules for a procedure to terminate the appointment of a surrogate parent when:

- (a) a child's parents are identified;
- (b) the location of the parents is discovered;
- (c) the child is no longer a ward of the state; or

- (d) the surrogate parent wishes to discontinue the appointment.

(History: En. Sec. 5, Ch. 618, L. 1985; amd. Sec. 7, Ch. 249, L. 1991; amd. Sec. 5, Ch. 356, L. 1993; amd. Sec. 99(4), Ch. 51, L. 1999.) Note: The above statute was amended by the legislature in 2003 to include the language underlined. Eff. 2/11/03

20-7-462 Responsibilities of surrogate parent.

A person assigned as a surrogate parent shall represent the child with a disability in all decision making processes concerning the child's education by:

(1) becoming thoroughly acquainted with the child's history and other information contained in school and other pertinent files, records, and reports relating to that child's educational needs;

(2) complying with state and federal law as to the confidentiality of all records and information to which he is privy pertaining to that child and using discretion in the necessary sharing of the information with appropriate people for the purpose of furthering the interests of the child;

(3) becoming familiar with the educational evaluation and placement for the child and by giving his approval or disapproval for the evaluation and placement and reviewing and evaluating special education programs pertaining to the child and such other programs as may be available; and

(4) initiating any mediation, hearing, or appeal procedures necessary and seeking qualified legal assistance whenever such assistance is in the best interest of the child.

(History: En. Sec. 6, Ch. 618, L. 1985; amd. Sec. 10, Ch. 249, L. 1991; amd. Sec. 99(4), Ch. 51, L. 1999.)

20-7-463 Surrogate parent -- immunity from liability -- reimbursement.

(1) A person appointed as a surrogate parent is exempt from liability for any act or omission performed by him in his capacity as a surrogate parent except an act or omission which is found to have been committed in a grossly negligent or malicious manner.

(2) A surrogate parent has the same protection and immunity in professional communications as a teacher.

(3) A surrogate parent must be reimbursed by the school district for all reasonable and necessary expenses incurred in the pursuit of his duties, as prescribed by rules adopted by the superintendent of public instruction.

(History: En. Sec. 7, Ch. 618, L. 1985.)

Administrative Rules of Montana Regarding Surrogate Parents:

10.16.3504 SURROGATE PARENTS

(1) Procedures for the appointment of a surrogate parent shall comply with 20-7-461, MCA.

(2) A foster parent meeting the requirements of 34 CFR 300.20(b) may act as a parent under Part B of IDEA if the natural parents' authority to make educational decisions on the student's behalf has been extinguished under state law and the foster parent:

- (a) has an ongoing, long-term parental relationship with the student;
- (b) is willing to make the educational decisions required of parents under IDEA; and
- (c) has no interest that would conflict with the interests of the student.

(3) The local educational agency shall petition a court of competent jurisdiction for termination of the surrogate parent appointment when the student's parents are identified, the whereabouts of the parents are discovered, the student is no longer a ward of the state or the surrogate parent wishes to discontinue her or his appointment.

(History: Sec. 20-7-402, MCA; IMP, Sec. 20-7-403, 20-7-414, MCA; NEW, 1977 MAR p. 277, Eff. 8/26/77, ARM Pub. 11/26/77; AMD, 1993 MAR p. 1913, Eff. 8/13/93; AMD & TRANS, 2000 MAR p. 1048, Eff. 7/1/00.)

Code of Federal Regulations (CFR) Regarding Surrogate Parents:

CFR 300.20 Parent

(a) General. As used in this part, the term parent means—

- (1) A natural or adoptive parent of a child;
- (2) A guardian but not the State if the child is a ward of the State;
- (3) A person acting in the place of a parent (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare); or
- (4) A surrogate parent who has been appointed in accordance with §300.515.

(b) Foster parent. Unless State law prohibits a foster parent from acting as a parent, a State may allow a foster parent to act as a parent under Part B of the Act if—

- (1) The natural parents' authority to make educational decisions on the child's behalf has been extinguished under State law; and
- (2) The foster parent—
 - (i) Has an ongoing, long-term parental relationship with the child;
 - (ii) Is willing to make the educational decisions required of parents under the Act; and
 - (iii) Has no interest that would conflict with the interests of the child.

[Authority: 20 U.S.C. 1401(19)]

CFR 300.515 Surrogate parents

(a) General. Each public agency shall ensure that the rights of a child are protected if—

- (1) No parent (as defined in §300.20) can be identified;
- (2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or
- (3) The child is a ward of the State under the laws of that State.

(b) Duty of public agency. The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method—

- (1) For determining whether a child needs a surrogate parent; and

- (2) For assigning a surrogate parent to the child.
- (c) Criteria for selection of surrogates.
 - (1) The public agency may select a surrogate parent in any way permitted under State law.
 - (2) Except as provided in paragraph (c)(3) of this section, public agencies shall ensure that a person selected as a surrogate—
 - (i) Is not an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child;
 - (ii) Has no interest that conflicts with the interest of the child he or she represents; and
 - (iii) Has knowledge and skills that ensure adequate representation of the child.
 - (3) A public agency may select as a surrogate a person who is an employee of a nonpublic agency that only provides non-educational care for the child and who meets the standards in paragraphs (c)(2)(ii) and (iii) of this section.
- (d) Non-employee requirement; compensation. A person who otherwise qualifies to be a surrogate parent under paragraph (c) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.
- (e) Responsibilities. The surrogate parent may represent the child in all matters relating to—
 - (1) The identification, evaluation, and educational placement of the child; and
 - (2) The provision of FAPE to the child.

[Authority: 20 U.S.C. 1415(b)(2)]

APPENDIX

- **Petition for Appointment of Surrogate Parent**
- **Affidavit in Support of Petition for Appointment of Surrogate Parent**
- **Order Appointing Surrogate Parent**

[Name, Address and Telephone Number
of Petitioner (or Attorney)]

BEFORE _____ COUNTY YOUTH COURT
_____ JUDICIAL DISTRICT, STATE OF MONTANA

In Re the Appointment of Surrogate * CAUSE NO. _____

Parent for _____, a minor *

[Initials of child] *

PETITION FOR APPOINTMENT OF
SURROGATE PARENT

COMES NOW, Petitioner, _____
[School District or Governing Authority of an Institution]
and hereby nominates _____

[Name and Address of Proposed Surrogate Parent]

to be appointed surrogate parent for _____, a minor.

[Initials of child]

This petition is made pursuant to Section 20-7-461, MCA. Petitioner's affidavit in
support of this Petition and the Affidavit of the Proposed Surrogate Parent in support of this
Petition are submitted herewith.

WHEREFORE, Petitioner prays that this Court appoint _____
[Name of Surrogate Parent]
as surrogate parent for _____. Petitioner respectfully requests that the Court appoint a
[Initials of Child]
surrogate parent in this matter within 45 days of the Court's receipt of all necessary supporting
documents. 20-7-461(3), MCA.

DATED this _____ day of _____.

[Signature of District Official]

1

2

3 **CERTIFICATE OF SERVICE**

4 THIS IS TO CERTIFY that on this ____ day of _____, I caused a true
5 and exact copy of the foregoing Petition for Appointment of Surrogate Parent to be mailed,
6 postage prepaid, to the following:

7 _____
8 _____
9 _____

10 [Names and Addresses of Proposed
11 Surrogate Parent, State Agency (if the
12 Child is a ward of the State)]

13 _____
14 [Signature of District Official]

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[Name, Address and Telephone Number
of Petitioner (or Attorney)]

BEFORE _____ COUNTY YOUTH COURT

JUDICIAL DISTRICT, STATE OF MONTANA

In Re the Appointment of Surrogate * CAUSE NO. _____

Parent for _____, a minor *

[Initials of child] *

AFFIDAVIT OF

[Name of Official of School District or Governing
Authority of Institution]

IN SUPPORT OF PETITION FOR
APPOINTMENT OF SURROGATE
PARENT FOR _____

[Initials of child]

_____, being first duly sworn upon _____ oath,
[Name of Person signing affidavit] [his/her]

deposes and says:

I am the _____ of _____;
[Title] [Name of School District or Institution]

_____ (hereinafter "the Child") is a minor child, age _____, and enrolled at
[Initials of Child]

_____ in
[Name of School or Institution]

_____ (hereinafter "the District").
[Location of School or Institution]

The Child has a disability identified as _____,
[Name of Disability]
which disability entitles the Child to receive special education services under the Individuals
with Disabilities Education Act (IDEA) (20 U.S.C. §1400, et seq.);

The Child's parents are _____.
[Names of Parents]
The District attempted to locate the Child's parents. After a reasonable effort, the District could
not locate the Child's parents, and the Child's parents' location remains unknown; **[OR]**
The Child is a ward of the State of Montana;

I have been designated by the Trustees of the School District to petition for the
appointment of a surrogate parent pursuant to 20-7-461(1), MCA;

The District requests that _____ be
[Name and Address of Proposed Surrogate Parent]
appointed surrogate parent pursuant to 20-7-461, MCA.

FURTHER AFFIANT SAYETH NOT.

DATED this _____ day of _____.

[Signature]

SUBSCRIBED AND SWORN TO before me this _____ day of _____.

Notary Public for the State of Montana.
Residing at _____
My commission expires: _____

BEFORE _____ COUNTY YOUTH COURT
_____ JUDICIAL DISTRICT, STATE OF MONTANA

In Re the Appointment of Surrogate * CAUSE NO. _____
Parent for _____, a minor *
[Initials of child] * **ORDER APPOINTING**
* **SURROGATE PARENT**

This matter having come on before the Court upon the Petition for Appointment of
Surrogate Parent of _____
[Name of School District or Institution]
and good cause appearing therefore,

IT IS HEREBY ORDERED that _____
[Name of Surrogate Parent]
is appointed to act as surrogate parent for _____ and shall have the responsibilities as
[Initials of Child]
set forth in 20-7-462, MCA. Said surrogate parent shall have immunity from liability and
receive reimbursement as provided for in 20-7-463, MCA. This Order shall remain in effect
until terminated pursuant to 20-7-462(4), MCA and ARM 10.16.3504.

DATED this _____ day of _____

YOUTH COURT JUDGE